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NO. 86 - 867

Supreme Court, U.S.
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JOSEPH E. SPANIO, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MILLER SESSION and ROSE SESSION,
Petitioners,

v.

I.T.O. CORPORATION OF AMERIPORT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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Respondent asserts that, by reason of the 1984 amendment to Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 933(f), the "stevedore's lien is a statutory right to recover, and no longer a judicially created lien based on

principles of subrogation" (Brief in Opposition, page 12). However, respondent does not identify what, if any, statutory language in Section 33(f) accomplishes this metamorphosis.

It is abundantly clear that the 1984 amendment to Section 33(f) was addressed to the issue of the priority of payment of legal fees and expenses in relation to repayment of the stevedore's lien, see Ochoa v. Employers National Insurance Co., 754 F.2d 1196 (5th Cir. 1985). Abandonment of the principle of subrogation as the underlying basis for the lien is not mentioned in the legislative history, and there is absolutely nothing in the statutory language to suggest that Congress intended to discard the principle of subrogation as the basis for the lien.

Respondent's assertion that the decision in the instant case is not in

conflict with the decision in The Etna, 138 F.2d 37 (3rd Cir. 1943), and Bloomer v. Liberty Mutual Insurance Company, 445 U.S. 74, 63 L.Ed.2d 215 (1980), ignores the admission in the lower court's opinion that --

Our holding does not comport with the rationale which led to the judicial establishment of the stevedore's lien. (18a) (Emphasis supplied)

Nor is there any merit in respondent's efforts to distinguish the instant case from The Etna or Bloomer. The fact that Section 33(f) was amended subsequent to the decisions in The Etna and Bloomer would be meaningful only if there was language in the statute as amended, or in the legislative history relating to the amendment, indicating a rejection of these decisions. As previously noted, there is no such language.

Nor does the fact that neither Bloomer nor The Etna involved situations where the third-party recovery was less than the combined lien and attorney's fees present a basis for distinguishing the instant case. The instant case has not yet been settled. The recovery in the instant case has not yet been determined. If the decision below is allowed to stand, petitioners will go back to the District Court and try their case against the South Jersey Port Corporation. In that trial they will prove their full medical expenses and full loss of wages. Assuming they recover a verdict, that verdict will have to be paid in full by the South Jersey Port Corporation without deduction for the compensation payments made by respondent, for petitioners, having to repay them, no longer will be in receipt of them. If the decision below is

allowed to stand, the loser will not be petitioner, but rather will be the State of New Jersey whose efforts to reduce its tort liability will have been thwarted.

Respectfully submitted,

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